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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1968

No. 1204

RALPH RICHARD BENSON,

Petitioner,

vs.

KENNETH E. KIRKPATRICK,
Probation Officer of Los Angeles
County, PEOPLE OF THE STATE
OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District.

OPINIONS OF THE COURTS BELOW

No opinion was rendered by the court below, simply a denial of a petition for writ of habeas corpus without a hearing and without an opinion. A copy thereof is annexed hereto as Appendix A, p. A-1.

Prior opinions in this case, both state and federal, on the issue of entrapment and frame-up have been presented to this court in this term, Benson v. Carter, et al., No. 562; October Term, 1968.

JURISDICTION

This is the fifth petition for a writ of certiorari in this case. However, all four prior petitioners were on the issue of entrapment and frame-up; this is the first petition to this court on the issue of unfair publicity and forced jury waiver.

The judgment herein sought to be reviewed was made and entered on October 17, 1968, by the Court of Appeal.

A petition for hearing by the Supreme Court of the State of California was denied on November 13, 1968. An application for an extension of time within which to file a petition for a writ of certiorari in this case was presented to Mr. Justice Douglas who on February 24, 1969, signed an order extending time to and including March 26, 1969.

The statutory provision believed to confer on this court jurisdiction to review the judgment of the Court of Appeal by writ of certiorari, is United States Code, Title 28, Section 1257(3).

QUESTIONS PRESENTED

1. Consistent with due process, may the District Attorney of Los Angeles County issue an inflammatory press release defaming and degrading the defendant upon a new indictment which he later dismisses, upon the same day that the defendant stands trial on old charges?

2. Consistent with due process, is a waiver of a jury trial coluntary when a defendant is forced to give up a jury because of highly sensational, inflammatory and degrading publicity fed by the District Attorney to the newspapers on the day of the trial?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides:

"... nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state...."

STATEMENT

Defendant is an attorney who was charged in this case with three felonies alleging that he conspired with two doctors in a money making scheme of defrauding insurance companies through presenting claims of injury when there were no injuries and presenting claims of medical visits and treatments when there were no visits or treatments. The so-called clients of the defendant attorney for whom the claims were presented were agents of the District Attorney's office. The defendant pleaded not guilty. Under the law at the time of the trial in 1960 defendant was not allowed to show that he was framed or entrapped by the agents of the District Attorney's office, since he had not admitted the commission of the offense charged.

The trial began on December 13, 1960, in Department 112, the courtroom of the Hon. Frederick W. Mahl, Jr., Judge presiding, with an attempt to pick an impartial jury. On the same day, that morning, the Grand Jury issued a new indictment against the defendant charging him with new crimes, both felonies and misdemeanors. The District Attorney, through

Deputy Fred Henderson, fed the new story to all the newspapers in the Los Angeles area. That afternoon, and the following day, every newspaper in the Los Angeles area carried the new story about the new indictment. See Exhibits "B", "C", and "D". Every television news program and every radio news program throughout the Southern California area carried the story. The wire services carried the story. The public was informed that the defendant was in the baby black market business working with doctors, selling babies into slavery, preventing mothers from finding their babies or re-claiming their babies, teaching mothers perjury, charging either $1500 or $4000.00 or $7500.00 for the sale of new-born babies, all against the law of New York and California.

This massive publicity, extremely prejudicial, was presented to Judge Mahl the next day. Judge Mahl instructed the prospective jurors to disregard anything they have read in the papers or heard on the air. By reason of this barrage of prejudicial publicity, it was fruitless to continue with the jury in spite of the admonition of the Judge. Defendant was forced, therefore, to waive a jury. He was convicted by the Judge on all counts. Defendant was put on probation. Defendant still insists that he was unlawfully framed and entrapped by the District Attorney's office. This point has come before this court on a petition for certiorari after a denial of a petition for habeas corpus on the point of entrapment by the Federal courts, Benson v. Carter, No. 562, this term.

In 1966, the United States Supreme Court decided the case of Shepperd v. Maxwell, 384 U. S. 333, declaring that prejudicial trial publicity does violate due process. In October of this year 1968, defendant filed a petition for habeas corpus with the Los Angeles Superior Court and with the Court of Appeal on the issue of unfair trial publicity. Both these petitions were filed before the termination of probation October 15, 1968. Both these petitions were denied. The denial by the Court of Appeal is set forth in Exhibit "A" attached herewith.

MANNER IN WHICH FEDERAL QUESTIONS RAISED

At the trial level, on the day following this barrage of newspaper publicity, there was a conference in chambers between defense attorney and the prosecutor and Judge Mahl. Thereafter, following the conference, the Judge instructed the jury to disregard all newspaper and television publicity concerning the defendant. I do not have any trial record of either this conference or the instruction to the jury. There was no request made for a change of venue or a continuance, because in 1960 such a request would have been futile under the law existing at the time.

A waiver of the jury trial was made, but I do not have any record showing what was said at the time, if anything.

On the original appeal, the point now presented was not raised because it would have been futile to do so under the law existing at the time.

REASONS FOR GRANTING THE WRIT

I

BOTH THE LOS ANGELES SUPERIOR COURT AND THE COURT OF APPEAL HAVE DISREGARDED THE LAW OF THE LAND SET FORTH BY THE UNITED STATES SUPREME COURT IN SHEPPERD v. MAXWELL

1. There is no question that the publicity was massive. Every Los Angeles paper carried it, the story was big, the story was on the front page, every television station carried it, every radio station carried it, the wire services had it. Indeed, the story was being shouted from every rooftop and from every street corner.

2. The publicity was inherently prejudicial. The story pictured the defendant as a money grubber, a peddler in human flesh, a seller of babies, a lawyer who advises perjury and a partner in crime with doctors. No jury and not even a Judge could even begin to listen to defendant when he took the stand to testify in his own behalf. There was no possibility that the defendant could be given the benefit of the presumption of

innocence before he took the stand or even when he was on the stand, especially when the defendant was charged with making a lot of money by conniving with doctors. Under the law in 1960, the defendant could present the defense of frame-up only if he stayed off the stand, but if he took the stand and denied the commission of the crime, under the law in 1960, he was denied the defense of frame-up and entrapment and because of the tremendous barrage of unfair publicity his own testimony on the stand would receive no weight whatsoever.

3. The barrage of publicity about new crimes was obviously prejudicial because none of that matter could be introduced at the trial itself then proceeding and had it been mentioned in any way at the trial would itself have brought a mistrial.

4. The role of the District Attorney was especially reprehensible in its denial of a fair trial to the petitioner. The District Attorney could have advised the Grand Jury not to bring out the indictment on the day that it did. The District Attorney should not have exploited that indictment by feeding the story to the news media. There is no question that the conduct of the District Attorney shows that he was out to get the defendant. However, the District Attorney was also attacking the constitution and the protection of all persons that they shall have a fair trial. The timing by the District Attorney of the indictment and news release showed he thought the story would be prejudicial to the case then starting. Outside the courtroom the

District Attorney was trying his case by plying the newspapers with false stories of crimes which he urged upon the Grand Jury and which he later dismissed.

Due process requires that an accused receive a fair trial by an impartial jury free from outside influences. Where there is a reasonable likelihood that adverse pre-trial publicity will prevent a fair trial, the trial judge should continue the case until the threat abates or transfer it to another county not so permeated with such publicity. If publicity during the proceedings threatens the fairness of a trial, a new trial should be ordered.

Shepperd v. Maxwell, 384 U. S. 333

II

THE GREAT WRIT CONTINUES EVEN THOUGH THE CONFINEMENT HAS ENDED

In this case the restraint or constructive confinement of probation ended on October 15, 1968. However, the petition for writ of habeas corpus were filed with the Superior Court and the Court of Appeal before October 15, 1968. The courts should give the defendant the opportunity to have the issues determined by the highest court to review these matters.

Carafas v. La Vallee, 391 U. S. 234.

III

BOTH THE LOS ANGELES SUPERIOR COURT AND THE COURT OF APPEAL HAVE DISREGARDED THE LAW OF THE LAND SET FORTH IN UNITED STATES v. JACKSON

A needless waiver of a jury trial is a violation of due process when the waiver is forced by the state.

The District Attorney made a fair trial impossible here by guiding the Grand Jury to the date when they came out with their indictment, an indictment which originated with the District Attorney, an indictment which was false, an indictment which he never proved, and an indictment which he himself dismissed. The District Attorney placed a needless burden upon the right to a jury trial, forcing the defendant to waive such a trial in violation of the constitution under the Sixth and Fourteenth Amendments.

United States v. Jackson, 390 U. S. 570

CONCLUSION

This court should give this defendant a new trial because there is no time limit on justice. A jury should have a right to decide whether this defendant was framed. This defendant has a

right to an impartial jury. This defendant has a right to expect that the District Attorney shall not spread vicious lies to the public and to the jury. A new trial should be ordered.

THE ISSUE HERE IS IMPORTANT: CAN OUR FREE SOCIETY LONG ENDURE WHEN THE DISTRICT ATTORNEY BECOMES A MANIPULATOR OF VICIOUS PROPAGANDA? WHEN THE DISTRICT ATTORNEY'S OFFICE TRIES CASES BY PRESS RELEASES, THEN OUR SOCIETY AND OUR CONSTITUTION ARE THROUGH.

Justice Frankfurter once wrote, before Shepperd v. Maxwell became the law of the land:

> "One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed. * * *

"Not a term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts -- too often, as in this case, with the prosecutor's collaboration -- exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of pre-possessions, evidence submitted in open court. Indeed, such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced, as a practical matter, to forego trial by jury. See State of Maryland v. Baltimore Radio Show, 338 U. S. 912, 915, 70 S. Ct. 252, 253, 94 L. ed. 562."

Justice Frankfurter wrote this in a concurring opinion in 1961; Irvin v. Dowd, 366 U. S. 717.

Respectfully submitted,

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EXHIBIT "A"

DECISION OF COURT OF APPEAL, SECOND DISTRICT:

Los Angeles, Cal. Oct. 17, 1968

TITLE: IN RE BENSON ON HABEAS CORPUS NO. 15734

THE COURT: Petition for Writ of Habeas Corpus denied.

CLAY ROBBINS, Clerk

EXHIBIT "B"

LOS ANGELES EVENING HERALD EXPRESS, TUESDAY, DECEMBER 13, 1960.

Front Page.

Headline: INDICT 5 IN L.A. BABY BLACK MARKET.

Sub-Head: 1 DOCTOR AND 4 LAWYERS ACCUSED.

Body of Story:

Four attorneys and one doctor today were indicted by the Los Angeles County Grand Jury on charges of participating in "black market" baby adoption practices.

The indictment - the final act of this Grand Jury before it finishes its term Thursday - was filed in the courtroom of Superior Judge John G. Barnes.

Indicted were Attorneys Ralph Benson, Anthony Carsola, Herbert Gelfand and Jordan Wank, and Dr. Aaron Lax. All are expected to surrender in court tomorrow.

Forty witnesses were heard by the jury over a three week period as it investigated the "black market" baby adoption business here.

It was testified that couples from New York paid from $1500 to $4000 for the privilege of adopting infants.

The five are charged with conspiracy to violate the welfare and institutions code relating to furnishing babies for adoption, and to violate laws requiring adoption agencies be licensed.

Most of the adoptions were out-of-state cases. All of the attorneys and the doctor are charged under separate indictments.

EXHIBIT "C"

LOS ANGELES EXAMINER, WEDNESDAY, DECEMBER 14, 1960.

Inside Front Page: "LOCAL MAIN NEWS".

Headline: 5 INDICTED IN ADOPTION CONSPIRACY.

Story:

Four Los Angeles attorneys and a physician were indicted by the County Grand Jury Tuesday on charges they conspired to violate California adoption statutes.

The indictments, returned in Superior Judge John G. Barnes' court, climaxed a month of investigation of asserted "baby black market" operations in the Los Angeles area.

Accused of conspiring to violate the statutes by placing California-born infants in New York homes for adoption for cash fees were attorneys Anthony Carsola, Herbert Gelfand and Jordan Wank and Dr. Aaron Lax.

Charged in another indictment with conspiring to violate the same laws, but in connection with a California adoption were Attorney Ralph Benson and Dr. Lax.

Dep. Dist. Atty. Fred Henderson, who summoned more than 40 witnesses to testify at

the Grand Jury hearings, said the laws wh[redacted] the defendants assertedly conspired to violate involved one felony and two misdemeanor statutes.

The felony, Section 181 of the Penal Code, prohibits anyone from accepting money for illegally placing another in the custody of a third. It is an old law, presumably enacted to prohibit slavery and peonage.

The misdemeanor statutes make it a crime for any agency or person, other than a mother, to place a baby for adoption without being licensed to do soby the State Department of Social Welfare.

EXHIBIT "D"

LOS ANGELES TIMES, WEDNESDAY, DECEMBER 14, 1960, PART II, PAGE 13.

Headlines: FOUR LAWYERS, DOCTOR INDICTED OVER ADOPTIONS.

Sub-Head: GRAND JURY CHARGES OPERATION OF LUCRATIVE BABY PLACEMENT BUSINESS OUTSIDE THE LAW.

Story:

Four Los Angeles lawyers, and one doctor were indicted by the county grand jury Tuesday for conspiracy to violate the state adoption laws in the operation of an alleged baby black market.

The indictments also charged conspiracy to violate a 19th Century section of the Penal Code prohibiting the sale of human beings.

Sub-Head: 30 Witnesses Heard.

Named in the indictments returned before Superior Judge John G. Barnes were Attorneys Ralph Benson, Anthony Carsola, Herbert Gelfand and Jordan Wank and Dr. Aaron Lax.

The jurors had heard 30 witnesses in a three-week investigation of charges that the local group was operating a lucrative baby placement business outside the law.

The charges were based on five specific cases in which newborn babies of California mothers allegedly were placed with adoptive parents in New York through the services of the defendants.

The indictments charge conspiracy to violate misdemeanor sections of the state Civil Code and the Welfare and Institutions Code and the felony section of the Penal Code.

The inquiry was asked by John M. Wedemeyer, head of the State Department of Social Welfare, who asserted that the local group charged as much as $7,500 to deliver infants to adopting parents.

Benson was also indicted on a second count of soliciting a crime in proposing that a supposed client-mother perjure a statement of her marital status to facilitate an adoption.

The grand jury probe followed charges that state laws, admittedly "vague and inadequate", were being flouted in the interests of large profits.

It was alleged that babies were placed with parents unknown to the natural mothers and that adoptive parents had no legal protection against losing their babies to mothers who changed their minds.

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